Doraisamy a/l Ramasamy & Anor v Krishnan a/l Periasamy & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–57 OF 2000
FAIZA TAMBY CHIK J
16 MAY 2001

Unincorporated Associations *— Societies — Co-operative society — Dispute between member and board members touching management or business of registered society — Whether members of board of society should be cited as a party to dispute*

Unincorporated Associations *— Societies — Internal management — Operation of lorry transport business — Failure to implement activity regulations contrary to society's by laws and order of Registrar General Co-operative Societies — Whether act was done bona fide in pursuance or execution of Co-operative Society Act 1993, regulations or by laws of society*

Unincorporated Associations *— Societies — Officer — Liability of officers and members of board of co-operative society — Joint and several liability of members of board for loss sustained through mismanagement — Co-operative Society Act 1993 s 45(1)*

Koperasi Kota Bhd ('KKB') was a registered co-operative society and the appellants were ordinary members of KKB whilst the respondents were the officers as well as members of the board of KKB. The appellants contended that losses amounting to RM108,243.41 ('the losses') were sustained by KKB as a result of the respondents' mismanagement of its lorry transport service. The issues of mismanagement and financial loss were raised by the appellants at KKB's annual general meetings ('AGM') from 1995 to 1998 and subsequently, reports were lodged with the police and the Registrar of Co-operative Societies ('the Registrar') concerning the alleged mismanagement. Pursuant to an inquiry conducted by the Registrar under s 67 of the Co-operative Society Act 1993 ('the Act'), the Registrar General made known his findings and issued an order to the chairman and the members of the board of KKB which, inter alia, stipulated that activity regulations governing KKB's lorry transport service ('the activity regulations') be drafted and presented to KKB's AGM for approval and a copy thereof submitted to the Registrar ('the said order'). However, the members of the board failed to comply with the order of the Registrar General. KKB's statements of account and audit reports for 1995, 1996, 1997 and 1998 ('the financial statements'), which were approved in the respective AGMs showed that the lorry transport business had incurred total losses amounting to RM108,243.41. The appellants lodged a reference of dispute to the co-operative tribunal. The tribunal dismissed the remedy sought by the appellants that the respondents be jointly and severally liable for the losses incurred by the KKB. The appellants appealed against the award. The main issue for determination in this appeal was whether the respondents were responsible for the losses.

Held, allowing the appeal: A

(1) The respondents were the principal officers and members of the board of KKB at all material times. Section 82(1)(b) of the Act expressly provided that if a dispute touching the management or business of a registered society had arisen between a member and its board or any officer of the society, that dispute shall be referred B to the Registrar General for decision. By virtue of s 83(4) of the Act, the Registrar General had the power to refer the dispute to the tribunal. In the instant case, the dispute between the appellants and the respondents concerned the operation of the lorry transport services and was one 'touching the management or C business' of KKB. Therefore, the appellants had rightly cited the respondents, being the officers of KKB as well as members of the board, as parties to the dispute. Hence, the tribunal erred in finding that the respondents had been wrongly cited and that the appellants' failure to plead KKB as the sole respondent or in substitution of the respondents had nullified the reference of D dispute (see pp 637I–638A, C, E–F).

(2) In respect of the liability of the officers of the society, s 45(1) of the Act enjoined all the members of the board to be jointly and severally liable for any loss sustained through mismanagement. The term 'jointly and severally liable' meant that all of the E promisors may be sued together or one or more may be selected as the object of the suit (see p 639B–C).

(3) There was overwhelming evidence that there was a serious dispute between the appellants and the respondents respecting the mismanagement of KKB's properties including the mismanagement of its lorry transport business. The dispute was F not in respect of KKB's decision to undertake the activity of lorry transport business as contended by the tribunal panel (see pp 639I–640A).

(4) The duties and powers of the members of KKB's board were provided under s 44 of the Act. Although KKB's by laws had G listed the duties to be carried out by the board, the powers of management that were exercisable by the members of the board were nonetheless subject to s 45 of the Act. When the members of the board exercised their powers, duties, dealings and transactions for and on behalf of KKB, they had to be done according to the H provisions of the Act, the regulations and by laws of KKB. Section 45 of the Act made the members of the board personally liable if they acted in contravention of the Act, regulations and by laws save when they acted bona fide in pursuance to the Act, the regulations and by laws (see pp 640H, 641A–D).

(5) The operation of the lorry transport business without passing the I activity regulations was clearly contrary to KKB's by law 8(3) and this attracted liability of the members of the board unless the act

was done bona fide in pursuance or execution of the Act, the regulations or the by laws of KKB. In the instant case, there was sufficient uncontroverted evidence to show that the respondents' breach of by law 8(3) was not bona fide and the respondents were not entitled to rely on s 45(2) of the Act (see pp 641E–F, 642A–B).

(6) The appellants had the evidential burden to prove their case and this had to be discharged by adducing sufficient and cogent evidence, whether written or oral from witnesses who had personal knowledge. In this context, the tribunal was empowered under s 83(5)(a) of the Act to procure and receive all such evidence, whether written or oral, including hearsay evidence and examine all such persons as the tribunal may think necessary. Therefore, the appellants were entitled to adduce written evidence in the form of the financial statements. By presenting evidence on the financial statements, the appellants had given sufficient evidence to prove that the sum of RM108,243.41 truly and accurately represented the cumulative losses incurred by KKB arising from the operation of the lorry business (see pp 645B–C, I–646A).

(7) Based on the oral evidence of the Director of Co-operative Department Selangor ('SP2') and her letter dated 15 May 1998 ('exh P13'), it was clear that KKB did not have the activity regulations, failed to comply with the said order and ignored the advice of the supervising officer of the Co-operative Department to comply with the said order. As such, the tribunal erred in not giving sufficient weight to the evidence of SP2 in proving the non-existence of the activity regulations (see p 647F–G).

(8) The tribunal erred in fact when it held that there was no mismanagement by KKB when in fact to a question on mismanagement, KKB's external auditor ('SP3') replied that there were weaknesses and further said that the losses were neither serious nor abnormal but were normal trading losses. SP3's opinion in this regard in no way contradicted the appellants' case which was on the liability of officers of KKB as members of the board for any loss sustained through the failure to exercise the prudence and diligence of ordinary men of business or through any act which was contrary to the provisions of the Act, the regulations or the by laws. Further, the tribunal erred when it inferred from SP3's evidence that such losses from the lorry transport service were not the result of the 'blameworthy conduct' or 'negligent omission' of the respondents. SP3's evidence mainly verified the financial statements but nowhere in the financial statements did SP3 mentioned regarding the management or the seriousness of the losses. Therefore, on the balance of probabilities, there was sufficient evidence to prove the loss of RM108,243.41 arising from the lorry transport business and that

at all material times, there were no activity regulations in existence to govern the lorry transport business (see p 648B–G).

(9) The respondents failed to exercise prudence and diligence as ordinary men of business when they failed to discharge their duties and responsibilities to ensure proper administration and management of KKB as laid down in its by laws. The contention that not all the members of the board were experienced and that they were unaware of the requirement of preparing the activity regulations was unacceptable. It was no excuse for members of the board to plead ignorance of the by laws as all the members of KKB were statutorily bound under s 17 of the Act (see pp 649H, 650B–C).

(10) There was cogent evidence to prove that the operation of the lorry transport business was undertaken and managed by the officers of KKB contrary to its by laws. Based on the by laws, it was mandatory for the board to formulate the activity regulations, which had to be approved at the AGM and a copy thereof submitted to the Registrar General. It was firmly established by evidence through the inquiry conducted by the Registrar General that at all material times, the board did not have the activity regulations and hence, the act of operating the lorry transport business by the board was clearly in breach of KKB's by law 8(3). When the members of the board undertook to manage the lorry transport business, they did not act bona fide in pursuance or execution of KKB's by laws 8(3) and 43(2)(w). As such, the respondents could not seek the protection of s 45(2) of the Act (see pp 650F–I, 651F–G).

[Bahasa Malaysia summary

Koperasi Kota Bhd ('KKB') merupakan sebuah koperasi berdaftar dan perayu-perayu adalah ahli biasa KKB manakala penentang-penentang merupakan pegawai serta ahli lembaga KKB. Perayu-perayu berhujah bahawa kerugian sebanyak RM108,243.41 ('kerugian tersebut') telah ditanggung oleh KKB akibat salah pengurusan penentang-penentang dalam perkhidmatan pengangkutan lorinya. Isu-isu salah urus dan kerugian wang telah dibangkitkan oleh perayu-perayu di mesyuarat agung tahunan ('AGM') KKB dari tahun 1995 hingga 1998 dan berikutnya, laporan telah dikemukakan dengan pihak polis dan Pendaftar Koperasi ('Pendaftar tersebut') berkenaan salah urus yang dikatakan. Menurut siasatan yang dijalankan oleh Pendaftar tersebut di bawah s 67 Akta Koperasi 1993 ('Akta tersebut'), Pendaftar Negara memaklumkan keputusannya dan mengeluarkan satu perintah kepada pengerusi dan ahli-ahli lembaga KKB yang, antara lain, menetapkan bahawa peraturan-peraturan kegiatan yang mengawal perkhidmatan pengangkutan lori KKB ('peraturan-peraturan kegiatan') didrafkan dan dikemukakan kepada AGM KKB untuk kelulusan dan sesalinan

diserahkan kepada Pendaftar tersebut ('perintah tersebut'). Walau bagaimanapun, ahli-ahli lembaga gagal mematuhi perintah Pendaftar Negara. Penyata akaun dan laporan audit KKB untuk tahun-tahun 1995, 1996, 1997 dan 1998 ('penyata kewangan'), yang diluluskan dalam AGM masing-masing menunjukkan bahawa perniagaan pengangkutan lori telah menanggung jumlah kerugian sebanyak RM108,243.41. Perayu-perayu mengemukakan suatu rujukan pertikaian kepada tribunal koperasi. Tribunal menolak remedi yang dipohon oleh perayu-perayu agar penentang-penentang dijadikan liable secara bersesama dan berasingan (jointly and severally liable) atas kerugian yang ditanggung oleh KKB. Perayu-perayu mengemukakan rayuan terhadap award tersebut. Isu utama untuk penentuan dalam rayuan ini adalah sama ada penentang-penentang bertanggungjawab atas kerugian tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Penentang-penentang merupakan pegawai-pegawai dan ahli utama lembaga KKB pada semua masa material. Seksyen 82(1)(b) Akta tersebut memperuntukkan secara nyata bahawa sekiranya suatu pertikaian yang menyentuh pengurusan atau perniagaan sesuatu persatuan berdaftar timbul di antara seorang ahli dan lembaganya atau mana-mana pegawai persatuan tersebut, pertikaian itu hendaklah dirujuk kepada Pendaftar Negara untuk keputusan. Disebabkan s 83(4) Akta tersebut, Pendaftar Negara mempunyai kuasa untuk merujuk pertikaian itu kepada tribunal. Dalam kes ini, pertikaian di antara perayu-perayu dan penentang-penentang adalah berkaitan dengan pengendalian perkhidmatan pengangkutan lori dan merupakan sesuatu yang 'menyentuh pengurusan atau perniagaan' KKB. Maka, perayu-perayu dengan betulnya telah menyaman penentang-penentang, iaitu pegawai-pegawai KKB serta ahli-ahli lembaga, sebagai pihak-pihak kepada pertikaian tersebut. Justeru itu, tribunal terkhilaf dalam mendapati bahawa penentang-penentang telah disaman dengan salahnya dan bahawa kegagalan perayu-perayu untuk memplid KKB sebagai satu-satunya penentang atau sebagai pengganti penentang-penentang telah membatalkan rujukan pertikaian itu (lihat ms 637I–638A, C, E–F).

(2) Berhubung liabiliti pegawai-pegawai persatuan tersebut, s 45(1) Akta tersebut mengenakan semua ahli lembaga supaya liable secara bersesama dan berasingan untuk kerugian yang dialami akibat salah urus. Istilah 'liable secara bersesama dan berasingan' bermaksud bahawa semua penjanji boleh didakwa bersama atau salah satu atau lebih daripada itu boleh dipilih sebagai objek guaman tersebut (lihat ms 639B–C).

(3) Terdapat keterangan yang amat kukuh bahawa wujudnya suatu pertikaian yang serius di antara perayu-perayu dan penentang-

penentang berkaitan dengan salah urus harta-harta KKB termasuk salah urus perniagaan pengangkutan lori. Pertikaian itu bukanlah berkaitan dengan keputusan KKB untuk mengelolakan kegiatan perniagaan pengangkutan lori seperti yang dihujahkan oleh panel tribunal (lihat ms 639I–640A).

(4) Kewajipan dan kuasa ahli-ahli lembaga KKB diperuntukkan di bawah s 44 Akta tersebut. Walaupun undang-undang kecil KKB telah menyenaraikan kewajipan yang harus dijalankan oleh lembaga, namun kuasa pengurusan yang boleh dilaksanakan oleh ahli-ahli lembaga tertakluk kepada s 45 Akta tersebut. Apabila ahli-ahli lembaga melaksanakan kuasa, kewajipan, urusan dan transaksi mereka untuk dan bagi pihak KKB, ini hendaklah dilakukan menurut peruntukan Akta tersebut, peraturan-peraturan dan undang-undang kecil KKB. Seksyen 45 Akta tersebut menjadikan ahli-ahli lembaga bertanggungjawab dalam keupayaan peribadi sekiranya mereka bertindak bertentangan dengan Akta tersebut, peraturan-peraturan dan undang-undang kecil melainkan mereka bertindak secara bona fide menurut Akta tersebut, peraturan-peraturan dan undang-undang kecil (lihat ms 640H, 641A–D).

(5) Pengendalian perniagaan pengangkutan lori tanpa meluluskan peraturan kegiatan jelas bercanggahan dengan undang-undang kecil 8(3) KKB dan ini mengakibatkan liabiliti ke atas ahli-ahli lembaga melainkan tindakan itu dilakukan secara bona fide menurut atu berikutan perlaksanaan Akta tersebut, peraturan-peraturan atau undang-undang kecil KKB. Dalam kes ini, wujudnya keterangan yang tidak boleh dicabar yang mencukupi untuk menunjukkan bahawa kemungkiran undang-undang kecil 8(3) oleh penentang-penentang tidaklah bona fide dan penentang-penentang tidak berhak bergantung pada s 45(2) Akta tersebut (lihat ms 641E–F, 642A–B).

(6) Perayu-perayu mempunyai beban keterangan untuk membukti kes mereka dan ini haruslah dilaksanakan dengan mengemukakan keterangan yang mencukupi dan meyakinkan, sama ada secara bertulis atau lisan daripada saksi-saksi yang mempunyai pengetahuan peribadi. Dalam konteks ini, tribunal tersebut berkuasa di bawah s 83(5)(a) Akta tersebut untuk memperolehi dan menerima keterangan sedemikian, sama ada secara bertulis atau lisan, termasuk keterangan dengar cakap dan memeriksa semua pihak yang difikirkan perlu oleh tribunal. Maka, perayu-perayu berhak mengemukakan keterangan bertulis dalam bentuk penyata kewangan. Dengan mengemukakan keterangan ke atas penyata kewangan, perayu-perayu telah memberi keterangan yang mencukupi untuk membukti bahawa jumlah sebanyak RM108,243.41 mewakili kerugian yang ditanggung oleh KKB secara tepat yang timbul daripada pengendalian perniagaan pengangkutan lori (lihat ms 645B–C, I–646A).

(7) Berdasarkan keterangan lisan Pengarah Jabatan Koperasi Selangor ('SP2') dan surat beliau bertarikh 15 Mei 1998 ('eksh P13'), adalah jelas bahawa KKB tidak mempunyai peraturan kegiatan, gagal mematuhi perintah tersebut dan tidak mengendahkan nasihat pegawai penyelia dari Jabatan Koperasi supaya mematuhi perintah tersebut. Oleh yang demikian, tribunal terkhilaf dalam tidak memberi pertimbangan yang mencukupi terhadap keterangan SP2 dalam membukti ketidakwujudan peraturan kegiatan (lihat ms 647F–G).

(8) Tribunal terkhilaf dari segi fakta apabila ia memutuskan bahawa tiada salah urus oleh KKB walhal sebenarnya dalam membalas persoalan atas salah urus, juruaudit luar KKB ('SP3') mengatakan bahawa wujudnya kelemahan dan selanjutnya mengatakan bahawa kerugian itu tidak serius mahupun luar biasa tetapi merupakan kerugian perdagangan yang biasa. Hemat SP3 berkenaan perkara ini tidak bertelingkah dengan kes perayu-perayu sama sekali yang berkaitan dengan liabiliti pegawai-pegawai KKB sebagai ahli-ahli lembaga untuk sebarang kerugian yang ditanggung melalui kegagalan untuk melaksanakan kebijaksanaan dan ketekunan ahli perniagaan yang biasa atau melalui sebarang tindakan yang bertentangan dengan peruntukan-peruntukan Akta tersebut, peraturan-peraturan atau undang-undang kecil. Seterusnya, tribunal terkhilaf apabila ia menyimpul daripada keterangan SP3 bahawa kerugian sedemikian daripada perkhidmatan pengangkutan lori bukanlah akibat 'blameworthy conduct' atau 'negligent omission' penentang-penentang. Keterangan SP3 utamanya mengesahkan penyata kewangan tetapi tidak di mana-mana pun dalam penyata tersebut SP3 menyebut pengurusan atau keseriusan kerugian itu. Maka, atas imbangan kebarangkalian, terdapat keterangan yang mencukupi untuk membuktikan kerugian sebanyak RM108,243.41 yang timbul daripada perniagaan pengangkutan lori dan bahawa pada semua masa material, tiada peraturan kegiatan yang wujud untuk mengawal perniagaan pengangkutan lori tersebut (lihat ms 648B–G).

(9) Penentang-penentang gagal melaksanakan kebijaksanaan dan ketekunan sebagai ahli perniagaan biasa apabila mereka gagal melaksanakan kewajipan dan tanggungjawab mereka untuk memastikan pentadbiran dan pengurusan KKB yang wajar seperti yang dinyatakan dalam undang-undang kecilnya. Penghujahan bahawa bukan semua ahli lembaga adalah berpengalaman dan bahawa mereka tidak sedar akan keperluan menyediakan peraturan kegiatan tidak boleh diterima. Ia tidak merupakan alasan untuk ahli-ahli lembaga memplid ketidaksedaran undang-undang kecil kerana semua ahli KKB adalah terikat secara berkanun di bawah s 17 Akta tersebut (lihat ms 649H, 650B–C).

(10) Terdapat keterangan yang meyakinkan untuk membuktikan bahawa pengendalian perniagaan pengangkutan lori dikelolakan

dan diuruskan oleh pegawai-pegawai KKB bertentangan dengan undang-undang kecil. Berdasarkan undang-undang kecil, adalah mandatori untuk lembaga merumuskan peraturan kegiatan, yang harus diluluskan di AGM dan sesalinan diserahkan kepada Pendaftar Negara. Ia telah pun dibuktikan secara kukuh oleh keterangan melalui siastan yang dijalankan oleh Pendaftar Negara bahawa pada semua masa material, lembaga tidak mempunyai peraturan kegiatan dan justeru itu, tindakan mengendalikan perniagaan pengangkutan lori oleh lembaga jelas memungkiri undang-undang kecil 8(3) KKB. Apabila ahli-ahli lembaga berjanji menguruskan perniagaan pengangkutan lori, mereka tidak bertindak secara bona fide menurut undang-undang kecil 8(3) dan 43(2)(w) KKB. Oleh yang demikian, penentang-penentang tidak boleh meminta perlindungan s 45(2) Akta tersebut (lihat ms 650F–I, 651F–G).]

Notes

For cases on unincorporated asssociations generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2111–2265.

Cases referred to

Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla (No 3) [1999] 6 MLJ 589 (refd)
Devi Singh v State of Haryana & Ors [1997] 10 SCC 752 (refd)
Madhava Rao v Surya Rao AIR 1954 Mad 103 (refd)
Noor Azahar bin Hashim v Rajeswari a/p Sithampara Filial & Anor [1991] 1 CLJ 150 (refd)
Registrar, Co-operative Societies v Dharam Chand & Ors AIR 1961 SC 1743 (refd)
Subramaniam v Tan Lee Leng & Ors [1980] 1 MLJ 171 (refd)
TA Miller Ltd v Minister of Housing and Local Government & Anor [1968] 2 All ER 633 (refd)
Thanaraj a/l Manikam & Ors v Lower Perak Tamil Co-operative Society [1997] 4 MLJ 82 (refd)

Legislation referred to

Co-operative Society Act 1993 ss 2, 9, 44, 67, 82(1)(b), 83(6), 90
Co-operative Societies Regulations 1995 s 33(1)
Rules of the High Court 1980 O 55 r 13

S Shanmugam (*Sutha & Co*) for the appellant.
D Kalaimani (*Kalai & Partners*) for the respondent.

Faiza Tamby Chik J:. This is an appeal from the award of the co-operative tribunal dated 27 May 2000 which dismissed without cost the

remedy sought by the applicants that the respondents be jointly and severally liable for the loss of RM108,243.41 incurred by Koperasi Kota Bhd, arising from the operation of the lorry transport service, and to pay forthwith the said sum of money to Koperasi Kota Bhd, together with interest at the rate of 8%pa on the said sum of RM108,243.41 from 1 January 1999 till full settlement and costs of the action. The main issue for determination in this appeal is whether the respondents, as officers of Koperasi Kota Bhd, are jointly and severally liable for the loss incurred by Koperasi Kota Bhd in the operation of the lorry transport service. The appellants' solicitors applied to setiausaha tribunal Koperasi vide a letter dated 8 June 2000 for documents including the award of tribunal after considering the opinion of respondents' solicitors, vide their letter dated 7 June 2000, which stated that the tribunal ought to hand down an award in accordance with s 83(6) of the Co-operative Society Act 1993 ('the Act') (see exh 'SN-C' affidavit lanjutan Sutharasanan a/l Shanmugam, dated 24 November 2000 ('ALSS')). Nevertheless, the learned pengerusi tribunal, in his letter dated 8 June 2000, disagreed and held that a sealed copy of the order ought to be issued by the tribunal for the appeal by the applicants, and indeed the setiuausaha tribunal Koperasi, under the instruction of the pengerusi tribunal, vide his letter dated 8 June 2000, stated that the practice of issuing sealed orders and noted that this may be what the appellants termed as award tribunal. It is relevant to note that the solicitors of the respondents, vide their letter dated 7 June 2000, are of the view that an award is equivalent to an 'alasan penghakiman' (exh 'SN-C', ALSS). The decision of the tribunal on 27 May 2000 dismissing the case of the applicants without costs was subsequently perfected and sealed as an 'order' of the tribunal (exh 'SN-C' ALSS). I think even if the decision ought to be termed as an award pursuant to s 83 of the Act, this difference in heading is merely an irregularity which is curable on the following grounds:

(i) there is no substantial injustice nor prejudice to the respondents as their solicitors admitted vide their letter dated 7 June 2000 (exh 'SN-C' ALSS) that an award is same as an 'alasan penghakiman', which indeed was delivered by the tribunal (exh 'SN-A' P2 ATSS);

(ii) this court exercising its original jurisdiction in the present appeal has the power to cure the said irregularity (if any);

(iii) the appellants acted under the direction of the learned chairman, vide his letters dated 8 June 2000 and 9 June 2000 (exh 'SN-C' ALSS), and therefore ought not to be prejudiced by the decision of the learned chairman to term the decision as an 'order';

(iv) the presumption of regularity operates upon the issuance of a sealed copy of the order by the tribunal.

I am of the opinion that there is one appeal before this court by way of a notice of originating motion dated 16 June 2000 pursuant to O 55 r 13 of the Rules of the High Court 1980, filed on 16 June 2000 in this court upon the direction of the learned chairman who had earlier rejected the appellants' notice of appeal dated 5 June 2000 vide his letter dated 8 June

2000 (exh 'SN-A' p 8 affidavit Sutharasanan a/l Shanmugam dated 3 October 2000). Moreover, the respondents have filed their affidavit in reply in respect of the motion. A

The facts of the present appeal are as follows: Koperasi Kota Bhd (formerly known as Koperasi Kota Kuala Selangor Bhd) is a registered co-operative society (p 56 afidavit tambahan Sutharasanan a/l Shanmugam dated 25 July 2000 (ATSS). The appellants (applicants in the tribunal below) are ordinary members of Koperasi Kota Bhd, whilst the respondents (also respondents in the tribunal below) are officers, as well members of the board of the said Co-operative. Pursuant to the original by-law 8(1)(c) Undang-Undang Kecil Koperasi Kota Kuala Selangor Bhd (p 80 ATSS) which allows the Co-operative to provide transport services, the Co-operative started the lorry transport service in 1995, which continued up till 1998 pursuant to the amended by-law 8(1)(a) Undang-Undang Kecil Koperasi Kota Bhd dated 25 November 1996 (p 128 ATSS, print unclear) of the society. The appellants were in serious dispute with the respondents in respect of the financial loss incurred by the Co-operative as a result of the purported mismanagement of the lorry transport service. The issue of mismanagement and financial loss in respect of the lorry transport services was raised by the appellants in every annual general meeting ('AGM') of the Co-operative from 1995 to 1998, and subsequently reports were lodged to the police and the Registrar of Cooperative Societies concerning the mismanagement of the Co-operative. On 8–9 December 1997, the Registrar of Co-operatives Selangor held an inquiry pursuant to s 67 of the Act, and by a letter dated 15 May 1998 to the chairman and members of the board of the Co-operative (pp 119–121 ATSS), the registrar general made known his findings (paras 4.1–4.5) and issued orders to the chairman and members of the board which, inter alia, stipulated that activity regulations governing lorry transport services have to be drafted and presented to the AGM for approval, and a copy thereof be submitted to the Registrar of Co-operatives Selangor (para 5.1). However, the members of the board failed, refused and/or neglected to comply with the order of the registrar general, particularly in respect of making the activity regulations of the lorry transport services and deliberately ignored the advice of the Supervising Officer of the Co-operative Department to do the same. Meanwhile, the statement of accounts and audit report of the Co-operative's auditor for years ending 31 December 1995, 31 December 1996, 31 December 1997 and 31 December 1998 which were approved in the respective AGMs of the Co-operative, clearly showed the annual loss incurred by the activity of the lorry transport services, which loss amounted to the sum of RM108.243.41. As the findings of the inquiry by the registrar of Co-operatives were not made known to them (p 63 ATSS), the appellants became dissatisfied and lodged a reference of dispute to the co-operative tribunal by filing a statement of dispute dated 5 March 1999 which was subsequently amended (p 296 ATSS) with approval of the tribunal on 9 May 2000, together with reliefs in paras 10(a)–10(1) being deleted (pp 34–35 ATSS). The respondents filed their statement of defence dated 19 May 1999, and on 28 February 2000, the tribunal ordered the B C D E F G H I

remedy against the second respondent be struck off as he had passed away on 1 June 1999.

The trial was held for six days involving six witnesses. The tribunal's panel delivered its award as contained in the order dated 27 May 2000 (exh 'SN–C' ALSS) and the alasan penghakiman (pp 2–12 ATSS). The applicants filed their notice of originating motion on 16 June 2000 which was subsequently amended and filed on 18 October 2000.

The tribunal panel found its award on the grounds stated in the alasan penghakiman. It is the submission of the appellants that the tribunal panel erred in fact and law in their grounds of judgment, and consequently the award of the tribunal's panel is incorrect based on the grounds of appeal stated in the notis usul pemula terpinda, dated 18 February 2000 ('NUPT'). The appellants therefore urged the court for the said award of the co-operative tribunal, dated 27 May 2000, to be set aside, and that the first and third respondents be made jointly and severally liable for the loss of the sum of RM108,243.41, incurred by the Koperasi Kota Bhd arising from the operation of the lorry transport services, and to pay forthwith the said sum of money to the Koperasi Kota Bhd together with interest at the rate of 8%pa on the said sum of RM108,243.41 from 1 January 1999 till full settlement and costs of the action.

The grounds of appeal in paras 7–10 of the notis usul pemula terpinda dated 18 October 2000 (NUPT), read together have raised certain preliminary issues which have to be disposed off first, namely:

(a) whether officers of the society can be cited as respondents to a dispute?;

(b) the presence of dispute between applicants and respondents;

(c) duties and powers of officers of the society.

Whether officers of the society can be cited as respondents to a dispute

Section 2 of the Act defines 'officer' to mean a chairman, secret treasurer or any other member of a board and includes any other person empowered by the regulations or by-laws to give directions in regard to the business of the registered society, and a 'board' to mean the governing body of a registered society to whom the management of its affairs is entrusted. By virtue of the amended by-law 43(2)(a) (p 147 ATSS), the board in order to discharge its duties, shall appoint from its members a chairman, vice chairman, secretary and treasurer and this is in accordance with s 43 of the Act which refers officers of registered society to members of the board and the Internal Audit Committee duly appointed at the annual general meeting. Therefore, I am of the opinion that the chairman, secretary and treasurer who are officers of the society are also members of the board of the society. In the instant case, the first and second appellants are ordinary members of the society, whilst the first and third respondents are officers and/or members of the board at all material times (pp 168–172 ATSS) for the years 1995 to 1998. It is observed that that s 82(1)(b) of the Act expressly provides that if a dispute touching the management or business of a registered society arises between

a member and its board, or any officer of the society, such dispute shall be referred to the registrar general for the decision, and by virtue of s 83(4) of the Act, the registrar general has the power to refer the dispute to such tribunal. The dispute between the appellants and the respondents, which is the operation of the lorry transport services, touches the management and/or business of the registered society, since the provision of transport services is the main activity of the society pursuant to original by law 8(1)(c) and amended by law 8(1)(a). In addition, s 33(1) (Part VIII) of the Co-operative Societies Regulations 1995 ('the Regulations') expressly provides that reference of a dispute to the registrar general under sub-s 82(1) of the Act, may be made by any party to the dispute in the form prescribed in Sch III, and further if the dispute concerns a sum of money due from a member of the board to the society, reference may also be made by any member of the society. Therefore, the appellants have rightfully cited the respondents as being officers of the society and also the members of the board as parties to the dispute. In this connection, it is pertinent to note that s 90 of the Act states that the provisions of the laws for the time being in force relating to trade unions, associations, societies and companies shall not apply to societies registered under the Act.

It is therefore abundantly clear in the present case that the chairman, secretary and treasurer of the society who are officers of the society as well as members of the board can be referred to the tribunal in disputes touching, inter alia, the management and/or business of the registered society by ordinary members of the society. The finding of the tribunal's panel that failure by the applicants to plead the co-operative as a sole respondent (which purportedly is provided under ss 9 and 44 of the Act '... to institute suits brought in the name of the registered Society') or in substitution of the three officers of the co-operative board who are wrongly cited thereby nullifying the reference of dispute as void ab initio, is wholly unwarranted. Section 9 of the Act merely states that registration of the society shall render it a body corporate by the name under which it is registered with the power to institute and defend suits and other legal proceedings, whereas s 44 of the Act merely states that the board of a registered society shall represent the society before all competent public authorities and in all dealings and transactions with third persons, and shall have power to institute or defend suits brought in the name of the registered society. Therefore, it is clear that ss 9 and 44 of the Act do not require the society to be named as a party to a dispute when members of the society are in dispute with officers of the society. On the other hand, when the society is named as a party to a dispute/suit or sues on its own name, then the board has the power to represent it in the dispute/suit. Hence, it is the board that has power to defend a suit brought against the society, and it is the board that has power to institute suits for the society. Consequently, to hold that in a dispute with the members of the board and/or officers of the society, it is proper to substitute the society as a respondent, is completely erroneous and contrary to the provisions of s 82(1) of the Act. The first, second and third respondents were the principal officers as well as members of the board throughout the relevant period, as admitted by the respondents, who

were directly entrusted with the transactions of the lorry transport business. The appellants are entitled to cite the first, second and third respondents as being officers of the society, as parties of the present dispute for reasons explained earlier. Moreover, there is no provision in the Act, the Regulations nor the by laws that require the appellants to cite all members of the board as parties in the dispute of the present nature. Indeed, as explained earlier by virtue of s 82(1)(b) of the Act, a dispute may arise between a member and an officer of the society. In respect of the liability of the officers of the society, s 45(1) of the Act enjoins all members of the board (who by virtue of s 2 of the Act are also officers of society) to be jointly and severally liable for any loss sustained through mismanagement. The term 'jointly and severally liable' clearly means that all the promisors may be sued together or one or more may be selected as the object of the suit (*Black's Law Dictionary* (6th Ed, 1990) p 837). By virtue of the proviso in s 45(2) which states that 'notwithstanding sub-s (1), no action, suit ... shall be brought or instituted personally against any member of the board or any officer of the registered society in respect of any act done ... bona fide in pursuance ... of the by laws', it is abundantly clear that the appellants are entitled to institute personally the present proceedings against any member of the board or any officer of the society in respect of any act done not bona fide, in pursuance of the by laws of the society. It is therefore perfectly clear that the first, second and third respondents in the present dispute can be made jointly and severally liable for the loss incurred to the society by instituting personally proceedings against them as officers of the registered society for carrying out the lorry transport services without activity regulations to govern the same, which according to credible and cogent evidence, was not done bona fide in pursuance of by law 8(3) of the registered society. This is supported by the cases of *Devi Singh v State of Haryana & Ors* [1997] 10 SCC 752 (at p 753, line e) wherein 'in the absence of accounting of the funds, the necessary inference was that there was improper management of the institution and thereby the president, treasurer and the secretary were liable for making good the loss caused to the society and the members', and in *Registrar, Co-operative Societies v Dharam Chand & Ors* AIR 1961 SC 1743 at p 1745, line 12, wherein it was stated 'The proceedings under that notice have nothing in common with the proceedings in the present dispute which, as we have already said, are in the nature of misfeasance proceedings against certain members of the managing committee, and in which their individual responsibility as members of the managing committee to make good the loss caused by the embezzlement fails to be considered'.

The presence of the dispute between the appellants and respondents

The dispute concerns the management and the business of running the lorry transport service, which is undertaken by the board of the society) as an activity pursuant to the original by law 8(1)(c) (p 80 ATSS), and amended by law 8(1)(a) (p 128 ATSS, print unclear). On the contrary, the dispute is not on the decision of the society to undertake the activity of the lorry transport service as contended by the tribunal panel. There

is overwhelming evidence that there was a serious dispute between the appellants and respondents in respect of the management and business of the lorry transport service in particular:

(i) in the 14th AGM of the society, the second appellant (p 277 ATSS para 18(a)) raised the issue of securing permits for the operation of lorries which was regarded as a current activity of the society (p 278 ATSS para aktiviti-aktiviti semasa (a));

(ii) in the 15th AGM of the society, a member of the society asked for the setting up of a special committee to check on the activities of lorry transport (p 290 ATSS para 10.0);

(iii) the first appellant (witness SP1) in the examination in chief and cross examination gave evidence that he raised the issue of lorry transport services (pp 14, 36–38 ATSS) with the respondents in the AGM and was further prevented from doing so when he questioned on the statement of accounts in respect of the lorry transport services;

(iv) this is supported by the minit mesyuarat agung ke 16 dated 29 June 1997 at para 7(a) usul-usul berbangkit (p 246 ATSS), whereby the first appellant (SP1) was questioned on no valid receipts in lorry transport service;

(v) further, the letter of complaint dated 20 October 1997 to the registrar general by first appellant (p 59 ATSS), and the letter of objection to the Registrar of Co-operatives, Selangor dated 23 June 1998 by second appellant (p 64 ATSS), and subsequently the letter on the abuse of power by the board dated 14 November 1998 to the police by both appellants (pp 66–67 ATSS) and the police report dated 19 November 1998, lodged by the first appellant (p 68 ATSS) are sufficient evidence of the said dispute.

The above oral and documentary evidence is clear proof that a serious dispute existed between the appellants and the respondents in respect of the mismanagement of the properties of the society, including the mismanagement of the lorry transport service. In the case of *Thanaraj a/l Manikam & Ors v Lower Perak Tamil Co-operative Society* [1997] 4 MLJ 82 at p 89 which relied on the Indian case of *Madhava Rao v Surya Rao* AIR 1954 Mad 103, it was held that the meaning of the 'touching' indicates that the dispute need not directly arise out of the business of the society, but that it is enough that it should have reference or relation to or concern the business of the society.

Duties and powers of officers of the society

I am of the opinion that the duties and powers of the officers of the society who are members of the board are defined according to s 44 of the Act whereby the board of a registered society in general shall direct, manage and supervise the business, the funds and the property of the registered society and shall exercise all the necessary powers to ensure the full and proper administration and management of the affairs of the society, except those powers reserved for the general meeting of the members or delegates. In this

regard, amended by law 43(2) has listed the duties that shall be carried out by the Board (p 247 ATSS). Be that as it may, these powers of management which are exercisable by the members of the board is subject to s 45 of the Act, which expressly provides for the liability of members of the board under certain circumstances specified therein. In the book entitled '*A Manual of Co-operative Law and Practice*' by BJ Surridge and Margaret Digby (3rd Ed, Oxford 1992) at p 137, it is stated 'Power to do all things necessary for the purpose of its constitution. This is subject to the law, rules and the by-laws. If the members wish the society to do other things which are not provided for in the by laws, they have to pass at a general meeting an amendment to the by laws. Before this amendment can operate, it has to be approved by the registrar …'. I think that when the officers of the society who are members of the board exercise their powers, duties, dealings and transactions for and on behalf of the society, it is to be done according to the provisions of the Act, the regulations and by laws of the society and any powers, duties, dealings and transactions exercised in breach of the said Act, Regulations and by laws cannot and ought not to be done on behalf of the society. Hence, s 45 of the Act makes them personally liable if they, inter alia, act in contravention of the Act, Regulations and by laws save when they act bona fide in pursuance or execution of the Act, the Regulations or the by laws of the registered society. In the context of s 45(1) of the Act, any loss sustained through any act which is contrary to the by laws will attract liability of the members of the board. In the present dispute, the loss sustained through the operation of the lorry transport business without passing activity regulations is clearly contrary to by law 8(3) of the society which consequently attracts liability of the members of the board. However, by virtue of the proviso in s 45(2) of the Act, such a breach of by law 8(3) will not impose liability on any member of the board or officer of the registered society if the act is done bona fide in pursuance or execution or intended execution of this Act, the regulations or the by laws of such registered society, which obviously includes by laws 8(3). There is sufficient uncontroverted evidence that the respondents' breach of by law 8(3) was indeed not at all bona fide such as:

(a) evidence of SR1 who stated that the members of the board did not know the rules, whereas in the minutes of the mesyuarat agung khas held on 17 December 1995 (exh R2, pp 281–282 ATSS), it is recorded that a total of 114 members of the society, including the first respondent were explained the by laws before the amendments were carried out;

(b) the evidence of SP2 (registrar of the Co-operative) that the order of the registrar general vide letter dated 15 May 1998 (exh PIS, p 119 ATSS) was not at all complied with by the first respondent as well as the members of the board in respect of passing the activity regulations for the lorry transport business;

(c) further, the evidence of SP2 who stated that the advice of the area supervising officer to have activity regulations for the lorry transport business was totally ignored by the members of the board;

(d) The admission of personal liability by the first respondent for the losses incurred in the sale of lorry No ND 2800 (para 4.6 p 120 ATSS) and the purchase of lorry No WCL 6025 (pp 294–295 ATSS).

The respondents' contention that since they acted bona fide in the intended execution of by law 8(1)(a), they are entitled to the defence of s 45(2) of the Act, is completely fallacious. Though the respondents were bona fide in the intended execution of by law 8(1)(a), all the same they were not bona fide in the execution of by law 8(3) for the reasons adduced above, and consequently cannot rely on s 45(2) of the Act that clearly stipulates that the act must be bona fide in the pursuance or execution or intended execution of the by laws of the society which not only includes by law 8(1)(a) but also by law 8(3). The appellants did not complain of the breach of by law 8(3) per se, since the breach was not made bona fide which enjoins liability on the part of the respondents. In this regard, it is only in the course of tendering evidence that SP2:

(i) Made available the letter of the register general containing the results of the inquiry and the orders made thereof (exh PIS, p 199 ATSS) of which the same was not made known earlier to the appellants;

(ii) revealed the non-compliance of the order of the registrar general to pass activity regulations for lorry transport business and subsequently the rejection of the advice of the area supervisor by the members of the board to do the same.

Further, only in the evidence of SR1, the respondents pleaded they were ignorant of the rules when indeed an EGM was held to explain the by laws (exh R2, pp 281–181 ATSS). I think the authorities of the respondents in respect of the company law cases such as *Harlowe's Nominess Pty Ltd* and *Howard Smith Ltd v Ampol Ltd* are not applicable to the facts of the present dispute by virtue of s 90 of the Act.

The grounds of appeal in paras 4, 6, 12, 13, 16 and 17 of the NUPT are related in respect of evidential burden of the appellants to prove:

(a) The loss of money incurred by the society in the operation of the lorry transport service.

(b) The absence of activity regulations governing lorry transport services.

Under the Act, s 83(5)(a) provides for the tribunal to procure and receive all such evidence, whether written or oral, and examine all such persons as witness as the tribunal may think it necessary to procure or examine and further sub-s (e) provides that notwithstanding any written law relating to evidence, admit any evidence, whether written or oral, which might be inadmissible in civil or criminal proceedings. Therefore, I think that the tribunal can receive hearsay evidence from witnesses. This is further supported in the case of *TA Miller Ltd v Minister of Housing & Local Government & Anor* [1968] 2 All ER 633 at p 634 whereby Lord Denning MR stated at paras H–F: '... Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross examination.

It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it …'.

The loss of money incurred by the society in the operation of the lorry transport service

Evidence on the loss of money incurred by the society in the operation of the lorry transport service was given by the third appellant witness (SP3) who was the external auditor appointed by the Society. SP3 produced the statement of accounts and audit report of the society for the years ending 31 December 1995, 31 December 1996, 31 December 1997 and 31 December 1998 respectively (exhs P19, P20, P21 and P22) which were tabled and approved by the respective annual general meetings. In summary, the annual loss of money incurred by the society in the operation of lorry transport services are:

(a) year ending 31 December 1995 — RM46,277.85 (exh P 19, p 176 ATSS);

(b) year ending 31 December 1996 — RM31,295.61 (exh P 20 p 197 ATSS);

(c) year ending 31 December 1997 — RM16,260 (exh P 21 p 213 ATSS);

(d) year ending 31 December 1998 — RM10 (???) (exh P 22, akaun perkhidmatan pengangkutan lori bagi tahun berakhir 31 December 1998, p 230 ATSS) — and RM14,400 (exh P 22 nota 17, p 239 ATSS).

In respect of the statement of accounts and audit report for the year ending 31 December 1998, the witness (SP3) explained nota 17 and stated that from a sum of RM20,000, a sum of RM5,000 had been forfeited by the vendor of the lorry vehicle, and the balance sum of RM15,000 was borne by the first respondent who to date had paid only RM5,600, leaving another RM9,400 due and payable. Therefore, the evidence of SP3 on the outstanding sum remaining unpaid is RM14,400 (p 25 ATSS). This evidence is supported by the first respondent (p 48 ATSS) who said he took responsibility to pay the RM15,000 by instalments of RM500 per month. The notes of proceedings at p 48 ATSS clearly show that SR2 (the first respondent himself) said because he was involved in purchase, he took responsibility for the loss and therefore the finding of the tribunal's panel (p 9 ATSS) that SR2's evidence proved be admitted on the basis of magnanimity, that is, without admission of personal liability, is completely unjustified. On the other hand, it was the opinion of SR1, who gave evidence in chief, that the first respondent as chairman assumed responsibility magnanimously. It is observed the appellants did not cross examine on the issue of magnanimity of the chairman (first respondent) taking personal responsibility for the loss for the following reasons:

(a) It was merely the opinion expressed by SR1 in his evidence that the audit test (p 192 ATSS) conducted by the auditor completely

contradicts the evidence of SR1 in respect of the absence of documents such as vouchers, receipts and bills. The evidence of SR1 that the first respondent magnanimously assumed responsibility for the losses sustained in the purchase of lorry No WCL 6025 was not challenged by the applicants for the simple reason that in the absence of evidence of no admission of personal liability at the material time, the appellants believed that such magnanimous assumption of responsibility can only mean the admission of personal liability for losses by the first respondent. In this connection, it is entirely erroneous of the tribunal, in the absence of evidence, to infer such assumption of responsibility was without admission of personal liability.

(b) There was neither any oral nor any written evidence to prove that the chairman himself admitted to the payment for the loss of RM15,000 without admission of personal liability.

In any event, the reason of the chairman (first respondent) taking responsibility to pay for the loss of RM15,000 has no bearing on the issue of the liability of members for the loss incurred by the society through the failure to exercise prudence and diligence of ordinary men of business, as defined in s 45(1) of the Act. It is the humble submission of the appellants that the test for liability of a member is an objective test. Further, in the evidence in chief, SR2 (first respondent/chairman) said 'nothing was done in bad faith' (p 48 ATSS). However, the first respondent cannot avail himself to the protection of s 45(2) of the Act for the reason that there is evidence of lack of bona fide such as:

(a) the evidence of SP3 in his statement of accounts and audit report (p 176, para (iii) ATSS) proves that lorries were purchased in early 1995, and according to SP2, four lorries were purchased in early 1995 as evidenced in a letter dated 15 May 1998 (p 119 ATSS which contradicts the evidence of SR2 (first respondent) who stated that the board passed a resolution approving the venture into the transport business in 1996;

(b) the evidence of SP2, who tendered the letter dated 15 May 1998 (exh P13, pp 119–121 ATSS) clearly showed the involvement of the first respondent in the purchase of four lorries, and subsequently directly involved with the sale of lorry No ND 2800 for RM6,000 only (para 4.4) whereby only RM1,000 was paid back to the Co-operative, and subsequently the registrar general had ordered him to pay the balance sum of RM5,000 (para 5.4).

I think the lack of cross examination of the SR1 or SR2 on the issue of magnanimity does not prove the case of the respondents in view of the above evidence adduced by the appellants which clearly does not prove good faith, much less the magnanimity of the first respondent in the present dispute. In the case of *Noor Azahar bin Hashim v Rajeswari a/p Sithampara Pillai & Anor* [1991] 1 CLJ 150 at p 153, para F–G) Richard Tallala JC (as

he then was) stated the importance of examining the facts and circumstances of the case to ascertain whether the rule (that failure to cross examine a witness on a crucial part of the case will amount to acceptance of the witness testimony ...) applies and if so to what extent. The tribunal's panel has completely misdirected itself by holding the view that the appellants must have personal knowledge of all the losses incurred in the lorry transport service to prove their case.

Indeed, applicants who are seeking the remedy have the evidential burden to prove their case, and this has to be discharged by adducing sufficient and cogent evidence, whether written or oral, from witnesses who have personal knowledge. In this context, the tribunal under s 83(5)(a) of the Act is empowered to procure and receive all such evidence, whether written or oral, and examine all such persons as witnesses as the tribunal may think it necessary to procure or examine. Therefore, I am of the opinion that the appellants are completely entitled to adduce written evidence in the form of the statements of accounts and audit reports of the Co-operative Society to substantiate or prove the losses incurred by the society in lorry transport services by calling the auditor of the society who acknowledged that he prepared the documents which were tabled and approved in the respective AGMs of the society (pp 24–25 ATSS). SP1, in his cross examination, said that the sum of RM108,243.41 is based on the auditor's reports of 1995 to 1998 (p 40 ATSS). The evidence of SP1 was not only based on the auditor's accounts but also on his personal knowledge as he was an internal auditor in 1998 wherein he knew about the absence of vouchers (pp 15–16 ATSS). SP1 did not disagree with the statement of accounts of the auditor, but there is ample documentary evidence he objected to the various transactions of the lorry transport business, in particular, expenditures without vouchers, receipts and bills and purchase of lorries without agreement. SP1, in his examination in chief has clearly stated the various issues he had raised in respect of the lorry transport service and further in his re-examination has agreed with the amended statement of dispute. In his connection, it is relevant to note that the cross examination of SP1 was done on 9 May 2000, some seven months after his examination in chief on 8 October 1999. The evidence of SP1 that unsatisfactory explanations were tendered by the board in the respective AGM, subsequently his attendance in the departmental inquiry into the affairs of the Co-operative and his personal knowledge on absence of vouchers clearly show the mismanagement of the lorry transport business. In this connection, it is pertinent to note a departmental inquiry pursuant to s 66 of the Act is only held consequent upon an inspection under s 64 or audit under s 60. SP1 is entitled to rely on the auditor's accounts to prove financial losses in the lorry transport business as by law 73 (p 164 ATSS) restricts ordinary members to obtaining particular documents and so could only rely on the auditor's reports. In any event, r 21(1) of the Co-operative Societies Tribunal Regulations 1998 states that the applicants (appellants in this court) shall be entitled to adduce evidence, call any witnesses or produce any document in support of his case. By presenting evidence on the statements of accounts and auditor's reports for the years ending

31 December 1996, 31 December 1997 and 31 December 1998, I am of the view that the appellants have given sufficient evidence to prove that the sum of RM108,243.41 truly and accurately represents the cumulative total loss of money incurred by the Koperasi Kota Bhd for the period 1995 to 1998 arising from the operation of the lorry service. On the other hand, the purpose of tendering exh P9 (p 66 ATSS) and exh P10 (p 68 ATSS) is not to prove the loss of the said sum of money by the society, but to prove that there was a serious dispute with the respondents in respect of the mismanagement of the properties of the society by the board.

The absence of activity regulations governing lorry transport services

Evidence on the absence of activity regulations governing lorry transport services was given orally by SP2 (the Director of Co-operative Department, Selangor) which was supported by her letter dated 15 May 1998, signed in her capacity as the Registrar of Co-operatives Selangor (exh P13, pp 119–121 ATSS). Although SP2 explained that she did not have personal knowledge of the investigation/inquiry on the management of the society, she did have personal knowledge on the findings of the inquiry, the orders issued to the chairman and members of the board vide her letter and their subsequent response. The findings of the inquiry and the orders of the registrar general, as stated in exh PIS, in respect of lorry transport services is reproduced below for convenience:

> 4 Hasil siasatan adalah seperti berikut:
>
> 4.1 koperasi ini telah didaftarkan pada 3 Jun 1975. Kegiatan utamanya ialah aktiviti pengangkutan;
>
> 4.2 pentadbiran dan pengurusan koperasi ini dijalankan oleh 15 orang anggota lembaga yang dipilih dalam mesyuarat agung tahunan;
>
> 4.3 koperasi ini telah terlibat secara aktif dalam aktiviti pengangkutan lori sejak awal tahun 1995. Koperasi mempunyai empat buah lori bagi menjalankan aktiviti tersebut. Nombor pendaftaran lori-lori koperasi adalah seperti berikut:
>
> 1 ND 2800
> 2 BBJ 5869
> 3 WBF 9847
> 4 CT 8108
>
> 4.4 koperasi tidak mempunyai permit lori bagi tujuan aktiviti pengangkutan. Mengikut penjelasan pengerusi, koperasi pernah memohon permit dari pihak berkuasa berkenaan tetapi sehingga kini, koperasi tidak berjaya memperolehinya. Sehubungan itu, pihak koperasi menggunakan permit atas pemilikan individu bagi operasi lori-lorinya;
>
> 4.5 semua transaksi beli dan jual semula lori-lori koperasi dibuat oleh En Krishnan a/l Periasamy yang juga Pengerusi Koperasi, En V Sivalingam, bekas Setiausaha Koperasi dan Bendahari Koperasi. Ini termasuk penjualan lori bernombor ND 2800 oleh En Krishnan a/l Periasamy dengan harga RM6,000. Hasil jualan tersebut En Krishnan hanya menyerahkan RM1,000 kepada Bendahari Koperasi dan dimasukkan ke dalam akaun koperasi;

5 sebagaimana peruntukan s 67 Akta Koperasi 1993, adalah dengan ini diperintah anggota lembaga Koperasi Kota Bhd mematuhi arahan-arahan berikut:

5.1 membuat aturan aktiviti pengangkutan. Ianya hendaklah dibentang seterusnya diluluskan oleh mesyuarat agung tahunan koperasi, satu naskah aturan aktiviti pengangkutan hendaklah dihantar kepada Pendaftar Koperasi Negeri Selangor;

5.2 mendapatkan semua baki jualan tanah koperasi di Kg Kuantan sebanyak RM45,000 daripada mereka yang terlibat;

5.3 memasukkan pembayaran elaun kepada anggota lembaga Koperasi dalam anggaran pendapatan dan perbelanjaan tahunan koperasi seterusnya dibentang dan diluluskan dalam mesyuarat agung tahunan ('AGM') koperasi;

5.4 memastikan En Krishnan a/l Periasamy, Pengerusi Koperasi membayar baki wang jualan lori bernombor daftar ND 2800 sebanyak RM5,000 (Ringgit Malaysia lima ribu sahaja) kepada Bendahari Koperasi. Bendahari Koperasi pula diminta untuk mengeluarkan resit penerimaan daripada En Krishnan a/l Periasamy. Seterusnya, bendahari diminta memasukkan wang tersebut ke dalam bank dan menunjukkan sebagai pendapatan dalam akaun koperasi.

SP2, in her evidence in chief (p 17 ATSS) stated that:

> To my knowledge, based on P13, the Co-operative did not have that peraturan. Kita sudah maklumkan that peraturan. Kita sudah maklumkan kepada Koperasi, mereka kena ada peraturan. According to my report, yang kita maklumkan kepada Koperasi untuk mengambil tindakan ke atas hasil siasatan. To my knowledge, I did not get the Peraturan Pegawai Penyelia, En Badrul Hisham according to him they have already sold the lorry, so what is the point of having the Peraturan? …

Hence, based on exh P13 and the oral evidence of SP2, at all material times the Co-operative did not have the activity regulations governing the lorry transport service, failed to comply with the order of the registrar general to form the said activity regulation, as contained in para 5.1 of exh P13, and further, ignored the advice of the supervising officer to do the same. In the premises, the tribunal's panel erred in not giving sufficient weight to the evidence of SP2, as mentioned above, in proving the non-existence of activity regulations governing the lorry transport service. In addition, the tribunal panel erred in considering the cause of 'misappropriation' with reference to the order of the registrar general as contained in para 5.4 of exh PIS (p 119 ATSS) and holding that SP2 had no personal knowledge of the contents of para 5.4 were the orders of the registrar general to be complied with by the chairman and members of the board. The contention of the respondents that by law 8(3) came into force with the new constitution only on 25 November 1996 is wholly misleading as by law 8(3) (p 80 ATSS) was in force since the original by laws were registered on 3 June 1975 (p 56 ATSS). SP2 personally knew that the first respondent was ordered to repay money by the registrar general vide the letter dated 14 May 1998 (exh P13, p 121 ATSS) which, in her opinion, was the result of misappropriation in

respect of the purchase of the lorry bearing registration number ND 2800. Further, the evidence of SP3 and SR1 supports evidence in para 5.4, in that it was confirmed that the first respondent did in fact pay to the Co-operative the sum of RM5,600 being part of the deposit sum forfeited by the vendor following the purchase of a lorry. It is pertinent to note from para 4.5 of exh P13 (p 120 ATSS) that at all material times all transactions of sale and purchase of the Co-operative's lorries were undertaken by the chairman, the secretary and the treasurer of the Co-operative. In respect of the evidence of SP3, I think that the tribunal panel erred in fact when it held in its grounds of judgment (p 7 ATSS) that SP3 in cross examination said there was 'no mismanagement' by the board when in fact to a question on evidence on mismanagement in reference to the statements of accounts and auditor's reports 1995, 1996, 1997, 1998', he replied, '... natural for co-operatives to have weaknesses ... and that the losses were neither abnormal nor serious but normal trading losses' (p 28 ATSS). The importance of the evidence of SP3 (the external auditor) is that both parties do not challenge the validity nor the contents of the auditor's accounts. On the issue of mismanagement, SP3 contended there were weaknesses and further said that the losses were neither serious nor abnormal but normal trading losses. I think that this opinion of SP3 in no way contradicts the appellants' case which is on the liability of officers of the society as members of the board for any loss sustained through the failure to exercise the prudence and diligence of ordinary men of business or through any act which is contrary to the provisions of the Act, the Regulations or the by laws. Further, the tribunal's panel, I think was completely erroneous when it inferred from SP3's evidence that such losses from the lorry transport service were not the result of the 'blameworthy conduct' or 'negligent omission' of the first and third respondents. I think SP3's evidence mainly verified the statements of accounts and audit reports of the Co-operative, and that his duties are subject strictly to s 63 of the Act, and nowhere in the reports has the auditor mentioned on the management and/or the seriousness of the losses. In the premises, I came to the conclusion that on the balance of probabilities, there was sufficient evidence to prove the loss of the sum of RM108,243.41 arising from the lorry transport services, and that at all material times there was no activity regulations in existence governing the lorry transport services.

The grounds of appeal in paras 1, 2, 3, 5, 14, 15, 18, 19, 20, 21, 22 and 23 of the NUPT relate to the liability of the respondents for the loss of the sum of money incurred by the society. As explained earlier, the respondents who are cited as officers of the society are by virtue of the amended by law 43(2) and ss 2 and 42 of the Act are also members of the board. The liability of the members of the board is statutorily enacted in s 45(1) of the Act which expressly provides that:

> In the conduct of the affairs of a registered society, the members of the Board of such registered society shall exercise the prudence and diligence of ordinary men of business and shall be jointly and severally liable for any loss sustained through failure to exercise such prudence and diligence or through any act which is contrary to the provisions of this Act, the regulations, the bye-laws of such registered society or the direction of its general meeting.

It is clear that s 45(1) of the Act specifically states that:

(a) liability of members of the board are joint and several;

(b) members shall be liable for any loss;

(c) loss may be sustained through failure to exercise such prudence and diligence or through any act which is contrary to the provisions of the Act, the regulations and the by laws of such a registered society or the direction of its general meeting.

I am of the opinion that the loss of RM108,243.41 arising from the operation of the lorry transport service was sustained under both circumstances:

(a) loss through failure to exercise such prudence and diligence of ordinary men of business; and

(b) loss through any act which is contrary to the provisions of the Act, the regulations or by law of such a registered society.

Loss through failure to exercise such prudence and diligence of ordinary men of business

It is observed that there is sufficient evidence to prove that the officers of the society did not exercise such prudence and diligence of ordinary men of business in the management and operation of the lorry transport service because:

(a) vouchers, receipts and documents such as sale agreements in respect of lorries were not produced for auditing and which was further confirmed by an audit test (p 176 para iii, p 192 para ii, p 208 para ii, pp 230 and 239 ATSS) which was contrary to their duties as provided under amended by law 43(2)(h) of the society (p 148 ATSS);

(b) no activity regulations were formulated when commencing the lorry transport service as it was not only their duty to do so under amended by law 43(2)(w) of the registered society, but mandatorily required under amended by law 8(3) of the society;

(c) the view expressed by the ketua pendaftar pursuant to s 59(2) of the Act and Reg 30 of the Co-operative Societies Regulations 1995 vide letter dated 6 May 1998 (p 253 ATSS) that the losses incurred in lorry transport service is aggravating ('meruncing') and needs to be reconsidered.

In brief, the members of the board failed to exercise prudence and diligence as ordinary men of business when they neglected to discharge their duties and responsibilities to ensure proper administration and management of the society as laid down under amended by law 43 and in particular amended by laws 43(2)(h), (k) and (w) (pp 148–150 ATSS). Further, it is clear that as ordinary men of business, the members of the board did not exercise prudence and diligence to ensure that the lorry transport service complied with amended by law 8(3) of the society which is subject to amended by law 8(1) of the society, which provides that the aim and

objective of the society be achieved by carrying out activities subject to the provisions of the Act and the regulations thereunder. In the premises, I think that as ordinary men of business exercising prudence and diligence, it is the basic duty and responsibility of the officers of the society who are members of the board entrusted with management of the society to undertake and manage the lorry transport service in compliance with the by laws of the society, the regulations and the Act. The evidence of SR1 that not all members of the board were experienced and they did not know that they needed to have regulations regarding lorry operating businesses (pp 45–46 ATSS) is wholly unacceptable as it is clear that ignorance of the by laws, whereby members of the society are statutorily bound under s 17 of the Act and indeed the statutory provisions of the law, is no excuse for members of the board, and in particular the officers of the society who have been entrusted with the management of the activities of the society. In the book entitled *Canadian Co-operative Law* by WB Francis (The Carswell Company Ltd, Toronto, 1959) at p 93, it is stated:

> The law relating to the obligations and responsibilities of directors applies generally to the directors of co-operatives. Directors acting as such within their powers and within the powers of the co-operative and without negligence, incur no personal liability. It is the first duty of the director to ascertain what those powers are, and his failure to do so may lead to personal loss, eg if the directors of a consumer's association incorporated under the Saskatchewan Co-operative Associations Act, authorizes an officer or employee of the association to sell goods contrary to the credit provisions of the Act and the association suffers loss, the directors may be required by the association to make good the loss in addition to penalties provided by the Act.

Loss through any act which is contrary to the provisions of the Act, the Regulations or the by laws of such registered society

More importantly, there was cogent evidence to prove that the operation of the lorry transport service was undertaken and managed by the officers of the society contrary to the by laws of the society. The amended by laws terpinda (p 129 ATSS) expressly declares 'bagi mengendalikan sesuatu aktiviti yang disebutkan di dalam fasal (1) itu, lembaga hendaklah membuat aturan-aturan aktiviti yang sesuai yang diluluskan oleh mesyuarat agung dan satu salinannya dikemukakan kepada ketua pendaftar'. I think it is mandatory for the board to formulate activity regulations for the lorry transport services which would have to be approved by the annual general meeting and a copy thereof submitted to the registrar general. This is supported by the evidence of SP2 (Registrar of Co-operatives Selangor) who stated 'sebelum koperasi menjalankan sesuatu aktiviti, peraturan hendaklah diadakan terlebih dahulu, dan peraturan ini terpaksa mendapat kelulusan mesyuarat agung …' (p 17 ATSS). It is firmly established by evidence in the instant dispute through the inquiry conducted by the registrar general that at all material times, the board did not have activity regulations governing lorry transport services, and therefore the act of operating the lorry transport services by the board without activity regulations is clearly in breach of amended by law 8(3) of the society. In the

said book entitled *A Manual of Co-operative Law and Practice* referred to earlier, it is stated at p 126:

> If a society is carrying on certain activities without having taken power specifically to do so under the by laws, it is acting illegally. For example, a society formed with the object of marketing members' produce is not allowed, without having passed the necessary by laws and having obtained the registrar's approval of the by laws, to start accepting deposits. It is important that not only the members of the committee, but also the members of the society generally should know what the by laws contain.

It is therefore beyond doubt that under s 45(1) of the Act, the members of the board shall be liable jointly and severally for the loss of a sum of money from the years 1995 to 1998, amounting to RM108,243.41, sustained through the act of operating the lorry transport services without the activity regulations, which is contrary to the amended by law 8(3) of the society. However, the personal liability of the members of the board, as defined in the circumstances stated in s 45(1), is subject to a proviso in s 45(2) that no action, suit, prosecution or other proceedings shall be brought or instituted personally against any member of the board or officer of a registered society in respect of any act done or statement made bona fide in pursuance or execution or intended execution of this Act, the regulations or the by laws of such registered society. Although the chairman and members of the board were ordered by the ketua pendaftar pursuant to s 67 of the Act to make activity regulations vide the letter dated 15 May 1998 (p 121 ATSS), it is clear from the evidence of SP2 that the members of the board did not take any steps to form the activity regulations for lorry transport services, and further, wholly ignored the advice of the pegawai penyelia to do the same which were contrary to their duty to consider and take appropriate action on the order given by the registrar general, as required under amended by law 43(2)(k). Therefore, I am of the opinion that when the members of the board undertook to manage the lorry transport services as provided under original by law 8(1)(c) or amended by law 8(1)(a), they did not at all material times act bona fide in pursuance or execution of amended by law 8(3) and amended by law 43(2)(w) of the society, and therefore the respondents cannot seek the protection of the proviso under s 45(2). In the case of *Subramaniam v Tan Lee Leng & Ors* [1980] 1 MLJ 171 at p 172, Salleh Abbas FJ (as he then was) said:

> There is no need for me to refer to any authorities to decide this case as I take it that the law on this matter is very clear, in that the court will not entertain any judicial proceedings where remedies provided for by statute have not been complied with.

In this connection, I think the respondents cannot seek the protection of s 45(2) when they did not do all that was necessary for them to do, in particular to comply with the order of the registrar general in the letter dated 15 May 1998 under s 67 of the Act, to have activity regulations for the lorry transport services. The contention of the tribunal panel that members of the board cannot be held liable for 'normal trading losses' is wholly untenable

for the reason that s 45(1) specifically states 'any loss' is wide enough to include normal or extraordinary, serious or small losses. Further, the view of the tribunal panel that the officers of the society cannot be held liable for the losses since there was no evidence of their 'blameworthy conduct' or 'negligent omission' plainly runs contrary to s 45(1) of the Act, in which members of the board can be jointly and severally held liable for any losses sustained by the society under the circumstances defined therein, unless they act bona fide in pursuance or execution of the Act, the regulations or by by laws of the Sosiety.

The conclusion of the tribunal's panel that 'the annual losses of the lorry transport services are normal trading losses which in their opinion is not suspicious ('mencurigakan') and consequently not caused by the board, nor the failure to exercise prudence and diligence by the officers of the society' is I think arrived at by a failure to construe and consider the full legal effect of s 45(1) of the Act to facts of the present dispute. The opinion of the tribunal's panel that having approved activity regulations is inconsequential as it does not guarantee the avoidance of losses, and further, it is of no use if there is no prudence and diligence of the board and consequently, what is important is the level of management to ensure the economic success of the activity, is to decry the full significance of the statutory provisions of the Act, the regulations and the by laws made thereunder and to venture into unfounded speculation. Indeed, it needs no emphasis to state that strict adherence to statutory provisions and by laws are essential to ensure prudence and diligence in management and consequently to build trust and efficiency in the society which I think would have avoided the present dispute.

The contention of the tribunal panel that no direct or indirect evidence was adduced to prove the liability of the third respondent in the present dispute is wholly unacceptable. The third respondent was at all material times a member of the board for the year 1995/1996 (p 168 ATSS) and subsequently a treasurer (officer) of the society for the years 1996/1997 (p 169 ATSS), 1997/1998 (p 170 ATSS) and 1998/1999 (p 172 ATSS). It is relevant to note that at all material times, the third respondent did not attend the tribunal hearing and adduce evidence to rebut the oral and documentary evidence adduced by the appellants. In the premises, I conclude that all the oral and written evidence adduced through the four applicants' witnesses is sufficient to prove the liability of the third respondent by virtue of s 45(1) of the Act, which explicitly provides that members of the board are jointly and severally liable for any losses incurred by the society under the circumstances specified therein. In addition, the tribunal ought to have drawn an adverse inference on the third respondent who failed to adduce evidence within his personal knowledge (see *Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla* (*No 3*) [1999] 6 MLJ 589).

The statement of reply of the respondents dated 19 May 1999 may be summarized as follows:

(a) all expenditure accounts and documents were produced for audit;

(b) all questions raised by the applicants in the annual general meetings were satisfactorily answered by the respondents;

(c) the respondents have given satisfactory explanations to the queries by the registrar of co-operatives;

(d) the statements of accounts for the year 1995 have been approved by the annual general meetings;

(e) the reference of dispute ought not to be heard under the Co-operative Societies Act 1993, and the reliefs applied for in para 10 of the statement of dispute are beyond the jurisdiction of the tribunal under the Co-operative Societies Act 1993, and ought to be dismissed without considering the merits of the complaint of the applicants.

The issues raised in the abovementioned paras (a), (b), and (c) are evidentiary in nature and has been dealt with the abovementioned. The defence of the respondents that all the statements of account and audit reports for the years 1995 and 1996, and indeed for years 1997 and 1998 have been approved by the respective annual general meetings, which also imply that the annual losses incurred by the society in the operation of the lorry transport services were also approved by the annual general meetings of the society, and consequently the applicants, as ordinary members, have no right to dispute the losses. I think the annual general meeting has only approved and adopted the statements of account and audit reports of the auditor on the loss of money incurred by the operation of the lorry transport services. At all material times, the annual general meeting had not absolved the liability of the officers of the society and members of the board for the loss of money incurred by the society in the operation of the lorry transport services. Indeed, the annual general meeting did not and ought not to override the express statutory provisions in respect of the liability of members of the board. In brief, for reasons earlier given, I think the amended statement of dispute, together with the remedies sought by the applicants are entirely within the jurisdiction of the tribunal and in strict compliance with the Act and the regulations made thereunder. I come to the conclusion that their reference of dispute to the tribunal against the respondents as officers of the society who are members of the board in respect of the loss of money incurred by the society in the management of the lorry transport services is in strict compliance with s 82(1) of the Act and s 33 (Part VIII) of the Co-operative Regulations 1995. There is sufficient cogent and credible evidence to prove that the cumulative losses of money incurred by the society in the operation of the lorry transport services amounted to RM108,243.41 from 1995 to 1998, during which, at all material times, it was proven that the officers of the society did not exercise such prudence and diligence as of ordinary men of business, and more significantly, did not have the activity regulations governing lorry transport services which are clearly contrary to amended by laws 8(3) and 43(2)(w) of the society. Hence, the respondents are personally liable to pay the society the said sum of money as there is clear evidence that they being officers of the society did not comply with the order of the registrar general vide letter dated 15 May 1998 to make activity regulations governing lorry

transport services for the approval of the annual general meeting with a copy thereof submitted to the registrar general in pursuance or execution of by laws 8(3) and 43(2)(w) of the society, and further completely ignored the advice of the supervising officer to do the same, and consequently the respondents were not bona fide within the meaning of s 45(2) of the Act in having the said activity regulations. In the premise, the appeal is hereby allowed with costs.

Appeal allowed.

Reported by Lim Lee Na